

**Cyberstruct Gen.-Contr., Inc. v Rite-Flow Mech.
Corp.**

2014 NY Slip Op 32616(U)

September 30, 2014

Sup Ct, Kings County

Docket Number: 17706/2011

Judge: Sylvia G. Ash

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS**

PRESENT: HON. SYLVIA G. ASH

-----X
**CYBERSTRUCT GENERAL-CONTRACTING,
INCORPORATED,**

Plaintiff,

DECISION / ORDER

- against -

Index # 17706/2011

RITE-FLOW MECHANICAL CORPORATION,

Defendants.

-----X
RITE-FLOW MECHANICAL CORPORATION,

Third-Party Plaintiff,

Third Party

- against -

Index # 75598/2012

**SENECA INSURANCE COMPANY and
823 CLASSON AVE, LLC,**

Third-Party Defendants.

-----X

The following papers numbered 1 to 8 read herein:

Papers Numbere

Notice of Motion/Order to Show Cause/

Petition/Cross Motion and

Affidavits (Affirmations) Annexed _____

1-3

Opposing Affidavits (Affirmations) _____

4-6

Reply Affidavits (Affirmations) _____

7, 8

Other Papers _____

Defendant, RITE-FLOW MECHANICAL CORPORATION (“Rite-Flow”), and Third-Party Defendant, 823 CLASSON AVE, LLC (“823 Classon”), move for an Order dismissing Plaintiff’s complaint on the grounds of res judicata and/or collateral estoppel. Third-Party Defendant, SENECA INSURANCE COMPANY (“Seneca”), moves for an Order granting it summary judgment and dismissing the third-party complaint as against it.

Background

The following facts are undisputed. Plaintiff, CYBERSTRUCT GENERAL-CONTRACTING, INCORPORATED (“Cyberstruct”), contracted with 823 Classon to be the general contractor for an apartment complex constructed at the address 823 Classon Avenue in Brooklyn, New York. Cyberstruct thereafter retained Rite-Flow as subcontractor to perform plumbing and sprinkler work on the premises. It is alleged that, on or around December 20, 2010, Rite-Flow failed to properly shut off the water to the subject premises before removing the sprinkler heads, thereby causing flooding to the premises and resultant damages.

Pursuant to a “Letter Agreement” dated February 22, 2011, Cyberstruct and 823 Classon outlined the terms under which Cyberstruct would be reimbursed for the water damage repairs it agreed to conduct. Specifically, the Letter Agreement provided that:

“823 Classon Avenue LLC is making a claim to its insurance company, Seneca, to reimburse it for the cost of repairing such damage. Upon completion of such work, the LLC will pay to Cyberstruct an amount equal to the net proceeds (after adjuster commissions) received by the LLC pursuant to such claim....[p]ending the final settlement and payment of such claim by Seneca, the LLC will pay to Cyberstruct an advance of \$100,000.00....”

Pursuant to this Letter Agreement, Cyberstruct commenced repair work and was advanced the \$100,000.00. Seneca, 823 Classon’s insurer, made a claim against Rite-Flow for the cost of repairing the damages. Ultimately, Seneca settled its claim with Rite-Flow in the amount of \$172,730.11, which was paid by Rite-Flow’s insurer, Utica First Insurance Company (“Utica”). In connection with this payment, Seneca and Utica executed a “Release and Indemnity Agreement.” From the aforementioned settlement amount, after insurance adjustments and deductibles, 823 Classon received net proceeds in the amount of \$162,819.54. However, 823 Classon did not forward the balance of \$62,819.54 to Cyberstruct as outlined per the Letter Agreement.

Cyberstruct thereafter submitted a claim to the American Arbitration Association for breach of contract against 823 Classon. Cyberstruct sought to recover, among other things, the total value of its repair work which it valued at \$257,290.82. Thus, in arbitration, Cyberstruct sought the balance of \$157,290.82 for the water damage repairs. The arbitration panel ultimately awarded Cyberstruct only \$62,819.00 for the repair work, presumably finding the aforementioned Letter Agreement determinative of the issue.

On or around August 4, 2011, after filing for arbitration but before the arbitration decision was rendered, Cyberstruct commenced the instant action against Rite-Flow to recover \$157,290.82

for the water damage repair work. On or around August 16, 2012, Rite-Flow commenced a third-party action against Seneca and 823 Classon for contractual and common law indemnification.

With the instant motion, Rite-Flow argues that Cyberstruct's complaint must be dismissed on the basis of *res judicata* and collateral estoppel. Rite-Flow contends that, per the terms of the Letter Agreement, Cyberstruct agreed that the value of its repair work would be equal to Seneca's valuation of the work; and that having failed to receive full payment for the repair work as per the Letter Agreement, Cyberstruct properly submitted the matter to arbitration which has now been fully resolved. In the alternative, Rite-Flow argues that Cyberstruct is collaterally estopped from re-litigating the value of its repair work in connection with the water damage because it is the very same issue that was litigated in the arbitration proceedings. Rite-Flow further contends that it is irrelevant that Rite-Flow was not a party to the arbitration since the party sought to be precluded, Cyberstruct, was a party to the arbitration and had a full and fair opportunity to be heard.

823 Classon joins and supports Rite-Flow's motion for summary judgment.

In opposition, Cyberstruct contends that it is bringing two separate actions - the arbitration proceeding against 823 Classon for breach of contract and the instant action against Rite-Flow for its negligence in causing the water damage. Cyberstruct argues that its claims against the two parties are wholly different: that the issue in arbitration was what Cyberstruct could recover from 823 Classon in light of their Letter Agreement, which did not include or involve any issues regarding what damages Rite-Flow caused by their negligence. Cyberstruct contends that the terms of the Letter Agreement entered into with 823 Classon does not bind it with regards to any claim that it may have against Rite-Flow.

Cyberstruct additionally argues that, since Rite-Flow was not a party to the arbitration proceeding, it has not had a full and fair opportunity to recover against Rite-Flow. Cyberstruct further submits that it is seeking different damages from Rite-Flow. Specifically, Cyberstruct states that it is seeking compensation for having to complete the project 120 days late, which cost Cyberstruct additional "general conditions damages," as well as the uncompensated cost of repairing the damage to the property as a result of Rite-Flow's negligence.

Also before the Court is Seneca's motion, by order to show cause, for summary judgment dismissing the third-party complaint as against it. Seneca argues it is entitled to summary judgment against Rite-Flow on the causes of action asserted against it, namely, contractual and common law indemnification because the "Release and Indemnity Agreement" relied on by Rite-Flow

unambiguously states that Seneca only agreed to indemnify Rite-Flow against any claims brought by or on behalf of “claimant,” who is defined within the agreement as Seneca or 823 Classon. Seneca contends that the term “claimant” does not include third-parties such as Cyberstruct. Moreover, Seneca contends that Rite-Flow does not have a claim for common law indemnification because Rite-Flow did not delegate any responsibilities for the duties giving rise to Rite-Flow or Cyberstruct’s losses to Seneca or 823 Classon. In addition, since it is alleged that Rite-Flow caused the water damages, Seneca argues that Rite-Flow is precluded from benefitting from the doctrine of common law indemnification.

In opposition to Seneca’s motion, Rite-Flow contends that Cyberstruct’s claims must be construed as being made on behalf of 823 Classon since Cyberstruct is attempting to hold Rite-Flow responsible for the same damages for which Rite-Flow has already paid Seneca as subrogee of 823 Classon. Rite-Flow argues that to find otherwise would result in the unjust enrichment of Seneca.

Discussion

“The doctrine of res judicata operates to preclude the reconsideration of claims actually litigated and resolved in a prior proceeding, as well as claims for different relief against the same party which arise out of the same factual grouping or transaction, and which should have or could have been resolved in the prior proceeding” (*Mahler v Campagna*, 60 AD3d 1009, 1011 [2d Dept 2009]).

The doctrine of collateral estoppel bars re-litigation of an issue which has necessarily been decided in a prior action and is determinative of the issues disputed in the present action, provided that there was a full and fair opportunity to contest the decision now alleged to be controlling (*Id.*). The doctrine applies to parties to the prior action or proceeding and those in privity with such parties (*Buechel v Bain*, 97 NY2d 295, 304 [Ct App 2001]). “Generally, a non-party to a prior litigation may be collaterally estopped by a determination in that litigation by having a relationship with a party to the prior litigation such that his own rights or obligations in the subsequent proceeding are conditioned in one way or another on, or derivative of, the rights of the party to the prior litigation” (*Chambers v City of New York*, 309 AD2d 81, 86 [2d Dept 2003]). The party seeking the benefit of the doctrine of collateral estoppel must establish that the identical issue was necessarily decided in the prior action and is determinative in the present action (*Buechel v Bain*, 97 NY2d at 304). Once the party invoking the doctrine satisfies this burden, the party to be estopped bears the burden of demonstrating the absence of a full and fair opportunity to contest the prior determination (*Id.*).

“The doctrines of res judicata and collateral estoppel apply to arbitration awards with the

same force and effect as they apply to judgments of a court" (*Mahler v Campagna*, 60 AD3d at 1011).

Upon consideration of the foregoing principles, the Court finds that res judicata and collateral estoppel do not apply to the facts herein. Although the facts underlying the arbitration proceeding and the instant litigation are identical, the issues and the parties in the two proceedings are not the same. The arbitration proceeding concerned Cyberstruct's breach of contract claims against 823 Classon based on the agreements solely between them. This is evident by the arbitration award of \$62,819.00, the exact amount Cyberstruct was entitled to under the aforementioned Letter Agreement. Rite-Flow fails to show how the arbitration proceeding between Cyberstruct and 823 Classon precludes Cyberstruct from commencing an action against Rite-Flow for its alleged negligence in causing the water damage in the first place and recovering the amount purportedly needed to make Cyberstruct whole. Rite-Flow was not a party to the arbitration proceeding, nor does Rite-Flow contend that it is in privity with 823 Classon. Moreover, the arbitration award does not indicate whether it determined the issue of Cyberstruct's damages. Thus, although Cyberstruct attempted to recover the entire value of its water damage repair work from 823 Classon in arbitration, the Court does not read the arbitration award as having decided the issue of Cyberstruct's total damages. As such, Cyberstruct is not precluded by res judicata or collateral estoppel from attempting to recover the balance of its purported damages.

Turning to Seneca's motion for summary judgment, the Court finds that, based on the "Release and Indemnity Agreement," Seneca does not have a duty to indemnify Rite-Flow against this action maintained by Cyberstruct. In addition, there is no basis for common law indemnification. As such, Seneca's motion for summary judgment is granted to the extent that Rite-Flow's claims for contractual and common law indemnification are dismissed as against it.

Accordingly, it is hereby

ORDERED that Rite-Flow's motion for summary judgment dismissing the complaint is DENIED; and it is further

ORDERED that Seneca's motion for summary judgment is GRANTED to the extent provided herein.


This constitutes the Decision and Order of the Court.

Dated: September 30, 2014

FILED

OCT 06 2014

KINGS COUNTY CLERK'S OFFICE



SYLVIA G. ASH, J.S.C.